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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

HASAN MUHAMMAD,

Petitioner,

vs.

JUNEAL PRATT,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May a witness who is found in civil contempt be ordered to pay compensatory sanctions to counsel for the party seeking testimony or documents from the witness, when the underlying order on which the contempt finding was based is vacated as erroneous?

PARTIES TO THIS ACTION

The parties to this proceeding are the petitioner Hasan Muhammad, and the respondent, Juneal D. Pratt.

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HASAN MUHAMMAD,

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vs.

JUNEAL PRATT,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is unpublished. A copy is attached hereto as Appendix A. The opinion of the United States District Court for the District of Nebraska is also not reported, but the court's final decision, finding Muhammad in contempt, awarding compensatory sanctions to

Pratt's attorney, and vacating the underlying order on which the finding of contempt was based, is attached as Exhibit B.

JURISDICTION

The judgment of the Eighth Circuit was entered on March 26, 1992. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. *Neb. Rev. Stat.* § 81-8,253 (Reissue 1987) provides in pertinent part:

> No proceeding, opinion, or expression of the Public Counsel shall be reviewable in any court. Neither the Public Counsel nor any member of his staff shall be required to testify or produce evidence in any judicial or administrative proceeding concerning matters within his official cognizance, except in a proceeding brought to enforce sections 81-8,240 to 81-8,254. [The Nebraska Public Counsel Act].

STATEMENT OF THE CASE

The petitioner, Hasan Muhammad, is Nebraska's Deputy Public Counsel (Ombudsman) for Corrections. Muhammad's office is located in the State Capitol in Lincoln, Nebraska. The respondent, Juneal Pratt, is an inmate confined in Nebraska's correctional system, in

Lincoln, Nebraska. Pratt sued several employees of Nebraska's correctional system under 42 U.S.C. § 1983, alleging violations of his civil rights.

On February 29, 1991, Pratt's court-appointed attorney served a deposition subpoena on Muhammad, directing him to come to the attorney's office in Omaha to be deposed and to produce a broad range of documents presumed to be in the files of the Nebraska Public Counsel.

On March 7, 1991, Muhammad moved to quash the subpoena on the grounds that disclosure of the information sought would violate a statutory privilege and that the subpoena duces tecum was overly broad and unduly burdensome.

On March 20, 1991, Magistrate Judge David L. Piester deferred ruling on the motion to quash to allow Muhammad to make a showing regarding his attempt to resolve the matter without the involvement of the court in accordance with Local Rule 20I for the U.S. District Court, District of Nebraska.

On April 5, 1991, Pratt's counsel filed a motion for an order directing compliance with the subpoena or in the alternative for contempt and sanctions. On the same day, Magistrate Judge Piester denied Muhammad's motion to quash.

On May 9, 1991, Magistrate Judge Piester issued an order directing Muhammad to comply with the subpoena duces tecum within ten days, with the exception that Muhammad's deposition was to be held in Lancaster County, Nebraska, where Muhammad's office was

located. Magistrate Judge Piester did not address the issues of statutory privilege or the question of whether the subpoena was overly broad and unduly burdensome.

The Magistrate Judge's order of May 9, 1991, was not served on Muhammad. Neither the court, nor defendants' counsel, nor plaintiff's counsel, sent any copy of the order to Muhammad.

On May 15, 1991, Pratt's counsel wrote to Muhammad, making reference to the Magistrate's order and inquiring about Muhammad's intent to comply with it.

On June 4, 1991, Pratt's counsel filed a motion for contempt and sanctions. The motion made no mention of "criminal" contempt.

On July 1, 1991, Magistrate Judge Piester issued an order for Muhammad to show cause why he should not be held in contempt of the order of May 9, 1991. The order made no mention of "criminal" contempt. because Muhammad was on vacation, he did not receive the order to show cause until July 15, 1991.

On July 16, 1991, Muhammad sought representation from the office of the Nebraska Attorney General. On July 17, 1991, Muhammad received for the first time a copy of the Magistrate Judge's order of May 9, 1991, directing him to produce documents for review by Pratt's counsel.

On July 23, 1991, the Attorney General filed a Motion for Relief from Order and for Protective Order on behalf of Muhammad, seeking to have the Magistrate Judge's order of May 9, 1991, vacated.

On July 25, 1991, an evidentiary hearing was held concerning whether or not Muhammad should be held in

contempt of the order of May 9, 1991, and what, if any, compensatory sanctions should be granted to plaintiff's counsel. No mention was made of any criminal contempt allegations at the hearing.

On September 4, 1991, U.S. District Court Judge Warren Urbom issued a Memorandum and Order [Appendix B] finding Muhammad in contempt of the Magistrate Judge's order of May 9, 1991, and ordering Muhammad to pay $774.00 in compensation to the plaintiff's attorneys. Judge Urbom noted that the motion seeking a contempt citation and monetary sanctions appeared to be in "the criminal, rather than the civil, contempt category." [Appendix B, p. 11]. In the same Memorandum and Order, Judge Urbom relieved Muhammad of the Magistrate Judge's order of May 9, 1991, finding that order to be an "incorrect statement of the law." Judge Urbom found that Muhammad should not be required to "disgorge what may be both privileged and massive documents, without the merits of the objections to the subpoena underlying the order having ever been carefully considered by the magistrate judge." [Appendix B, p. 12].

Muhammad filed his Notice of Appeal to the U.S. Court of Appeals for the Eighth Circuit on September 30, 1991, appealing the District Court's order finding Muhammad in contempt of court and ordering the payment of sanctions by Muhammad to plaintiff's counsel. In the appeal, Muhammad argued that the contempt was civil in nature and should not stand in light of the fact that the underlying order on which it was based was vacated as erroneous.

On March 26, 1992, the Court of Appeals issued its opinion. [Appendix A]. The Court of Appeals acknowledged that the contempt was not criminal in nature, but failed to address Muhammad's pivotal argument that the finding of contempt should not stand in light of the fact that the underlying order was vacated as erroneous.

REASONS FOR GRANTING THE WRIT

A. A WITNESS FOUND IN CIVIL CONTEMPT SHOULD NOT BE ORDERED TO PAY COMPENSATORY SANCTIONS TO COUNSEL FOR THE PARTY SEEKING THE TESTIMONY OR DOCUMENTS FROM THE WITNESS, WHEN THE UNDERLYING ORDER ON WHICH THE CONTEMPT FINDING WAS BASED IS VACATED AS ERRONEOUS.

In the district court's order of September 4, 1991 [Appendix A], the court indicated that the motion seeking a contempt citation and monetary sanctions appeared to be in "the criminal, rather than the civil, contempt category." [Appendix A, p. 11]. In his appeal to the U.S. Court of Appeals for the Eighth Circuit, Muhammad argued that the contempt citation was *civil* in nature. Muhammad noted that at no time did he receive any notice of criminal contempt proceedings, as required by Fed. R. Crim. P. 42(b). [18 U.S.C. Rule 42(b)].

Muhammad also argued that the finding of contempt should be reversed because the underlying order on which it was based was vacated as erroneous. The Court of Appeals specifically found that the contempt was *not*

criminal. [Appendix A, p. 3]. The Court of Appeals declined to reverse the finding of contempt, however, and did not address Muhammad's central argument.

Because Muhammad was found in civil contempt, the district court's order should have been reversed, due to the fact that the underlying order of May 9, 1991, of which Muhammad was found to be in contempt, was in error and was vacated.

An order of civil contempt designed to compensate a complainant for losses sustained cannot stand if the underlying order on which it is based is overturned. *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947).

The U.S. Court of Appeals for the Fifth Circuit recognized this principle in *Norman Bridge Drug Company v. Banner*, 529 F.2d 822 (5th Cir. 1976), and in *ITT Community Development Corp. v. Barton*, 569 F.2d 1351 (5th Cir. 1978):

> A party held only in civil contempt by way of compensation to his adversary will be absolved of liability if the court order was invalid or erroneous. The adversary should realize no gain from orders to which he was not entitled. *e.g. United States v. UMW*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947); *Worden v. Searls* [121 U.S. 14, 7 S.Ct. 814, 30 L.Ed. 853 (1887)]; *Carter v. United States* 5 Cir. 1943, 135 F.2d 858; *Salvage Process Corp v. Acme Tank Cleaning Process Corp.*, 2 Cir. 1936, 86 F.2d 727.

Norman Bridge Drug Company, supra, at 828.

The U.S. Court of Appeals for the Seventh Circuit acknowledged the same principle in *Blocksom & Co. v. Marshall*, 582 F.2d 1122 (7th Cir. 1978):

> The purposes of *civil* contempt orders are to coerce compliance with the underlying order and/or to compensate the complainant for loss sustained by disobedience. [*United Mine Workers, supra*] at 303-04, 67 S. Ct. 677. Accordingly, civil contempt may be defended on the ground that the underlying order was erroneously issued.

Id. at 1124 [emphasis in original].

The U.S. Court of Appeals for the Tenth Circuit addressed the issue in *Ager v. Stormant Hosp. & Training School for Nurses*, 622 F.2d 496 (10th Cir. 1980):

> When a recalcitrant witness fails to obey the duly issued orders of a court, he may be cited for contempt, either criminal, civil or both. Whether the adjudication of contempt "survives the avoidance of [the] underlying order depends on the nature of the contempt decree. If the contempt is criminal it stands; if it is civil it falls." *Latrobe Steel Co. v. United Steelworkers*, 545 F.2d 1336, 1342 (3rd Cir. 1976). [Footnote omitted]. *See also United States v. United Mine Workers*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947); *Burkett v. Chandler*, 505 F.2d 217 (10th Cir. 1974), *cert. denied*, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed. 2d 110 (1975); *Hyde Construction Co. v. Koehing Co.*, 348 F.2d 643 (10th Cir. 1965) *rev'd on other grounds* 382 U.S. 362, 86 S.Ct. 522, 15 L.Ed. 2d 416 (1966).

Ager, supra, at 499.

In *Scott & Fetzer Co. v. Dile*, 643 F.2d 670 (9th Cir. 1981), the U.S. Court of Appeals found that the district court had abused its discretion by holding a party in civil contempt when the underlying order leading to the contempt citation was invalid:

> The Supreme Court stated in *United States v. United Mine Workers*, 330 U.S. 258, 295, 67 S.Ct. 677, 696, 91 L.Ed. 884 (1947), that "[t]he right to remedial relief falls with an injunction which events prove was erroneously issued."
>
> Several other circuits have held specifically that a civil contempt judgment is invalidated if the underlying injunction is determined to be invalid. [Footnote citing 3rd, 5th and 7th Circuit cases omitted]. These courts have distinguished between "coercive" civil contempt and "remedial" civil contempt in their analysis, but have come to the conclusion that neither can survive the invalidity of the underlying injunction. . . .
>
> The order finding Dile in contempt was clearly "civil" contempt. . . . In addition, it appears that the contempt order is of the "remedial" nature as its purpose was to compensate Kirby for the costs incurred in the contempt hearing. . . . The contempt judgment is for remedial purposes and, therefore, must fall as a result of our decision invalidating the underlying injunction. *See United States v. United Mine Workers, supra*, at 295, 67 S.Ct. at 696.

Scott & Fetzer Co., supra, at 675.

When affirming the district court's decision finding Muhammad in contempt and ordering the payment of compensation to Pratt's attorneys, the Court of Appeals relied on this Court's decision in *Chambers v. Nasco, Inc.*,

501 U.S. ___, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). In fact, *Chambers* was the *only* case cited by the Court of Appeals. *Chambers*, however, involved a party's bad-faith, vexatious, wanton and oppressive conduct, resulting in the practice of a "fraud" upon the court. *Id.* at 2126. Muhammad's conduct in no respect fit such a description. *Chambers* did not involve a situation where any underlying order on which the finding of contempt was based was vacated as erroneous. The Court of Appeals' reliance on *Chambers* was, therefore, misplaced.

Because Muhammad was found to be in civil contempt of an order which was in error and was vacated, the finding of contempt should have been reversed. Pratt's attorneys should realize no gain from an order to which Pratt was not entitled.

B. THE DECISION RENDERED BY THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT IS IN CONFLICT WITH A PRIOR DECISION OF THE SUPREME COURT AND WITH THE DECISIONS OF OTHER U.S. COURTS OF APPEALS.

The decision of the U.S. Court of Appeals for the Eighth Circuit is in conflict with this Court's decision in *United States v. United Mine Workers*, 330 U.S. 258 (1947). The Court of Appeals' decision is also in conflict with decisions of the U.S. Courts of Appeals for the Fifth, Seventh, Ninth, and Tenth Circuits, cited and quoted above.

The conflict appears to have resulted from the Eighth Circuit's interpretation of this Court's decision in *Chambers, supra*, in which this Court recognized the inherent

authority of federal district courts to impose sanctions for bad-faith conduct. The Eighth Circuit's reliance on *Chambers*, however, was misplaced because *Chambers* did not involve a situation where any underlying order on which the finding of contempt was based was vacated as erroneous. *Chambers*, therefore, did not reverse this Court's decision in *United Mine Workers*.

CONCLUSION

The petitioner respectfully requests that the Court issue its writ of certiorari to review the record in this case and to vacate the district court's finding of contempt and the imposition of sanctions against Muhammad, affirmed by the U.S. Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 91-3387

Juneal D. Pratt, Appellee, v. Governor K. Orr; Frank Gunter; Warden Clarke; Warden Shaw; Major Naylor; Ex Major Knight; Captain L. Wright; Don Beaver, Commission on Accreditation Representative; John Galey, Grievance Board and Ex Warden; G. Grammer; R. Bartee, Parole Board Chairman, individually and professionally, Defendants, Hasan Muhammad, Appellant.	*	Appeal from the United States District Court for the District of Nebraska. [UNPUBLISHED]

Submitted: March 12, 1992
Filed: March 26, 1992

Before FAGG and BEAM, Circuit Judges, and BATTEY,* District Judge.

PER CURIAM.

Hasan Muhammad appeals the district court's entry of an order of contempt and sanctions of attorney's fees against him for failure to comply with an order [of] the court. We affirm.

The chronology of events leading to the fee order is adequately set forth in the district court's opinion and need not be repeated here. We are convinced that the district court acted properly and within the bounds of its authority in ordering the sanction and we affirm the district court on the basis of its well-reasoned opinion. *See* 8th Cir. R. 47B. The district court's conclusion is lent further support by the recent case of *Chambers v. Nasco, Inc.*, 111 S.Ct. 2123, 2133 (1991) (a federal court may resort to its inherent power in assessing attorney's fees as a sanction for the willful disobedience of a court order).

---

* The HONORABLE RICHARD H. BATTEY, United States District Judge for the District of South Dakota, sitting by designation.

One issue deserves brief discussion. Appellant asserts that it is not clear from the language of the district court's opinion whether he was held in civil or criminal contempt. We think that it is certain that the district court did not find criminal contempt. Beyond that, we believe the label attached to the action taken is unimportant.

Although the court used reasonable attorney's fees as the measure of monetary sanctions, it is clear from the court's opinion that the sanction was intended to vindicate the authority of the court. *See, e.g., id.* at 2137 (stating that an award of attorney fees serves the same purpose as a fine imposed for civil contempt because it vindicates a court's authority over a recalcitrant individual). Thus, we find "that the district court acted within its discretion in assessing [the attorney's fees] as a sanction for [Muhammad's] . . . conduct." *Id.* at 2138.

Muhammad asserts that he was not provided proper notice and further asserts that there was no showing that his actions were willful. We reject both contentions. Muhammad admittedly received copies of a motion for contempt and sanctions, and an order to appear and show cause why he should not be held in contempt for failure to comply with the earlier order of the court. A hearing was held at which Muhammad testified. With regard to willfulness, Muhammad testified at the hearing that he had no intention of complying with the court's order. We note that Muhammad is an attorney who is or should be familiar with the consequences of failure to

comply with a lawful order of the court. Accordingly, the order of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

DEPT. OF JUSTICE
SEP 06 1991

State of Nebraska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUNEAL D. PRATT, Plaintiff, vs. GOVERNOR K. ORR, et al., Defendants.	)	CV88-L-619 MEMORANDUM AND ORDER ON MOTION FOR CONTEMPT ORDER AND SANCTIONS AND MOTION FOR RELIEF FROM ORDER OF MAY 9, 1991

Hasan Muhammad, Deputy Public Counsel for Corrections (ombudsman), has failed to comply with the magistrate judge's order of May 9, 1991, prompting a motion by the plaintiff to hold Muhammad in contempt and issue sanctions upon him, filing 55. Muhammad has moved for relief from the order of May 9, 1991, and a protective order, filing 72. I shall sustain both motions, holding Muhammad in contempt and relieving him of the order of May 9, 1991.

This is the chronology:

1. On February 29, 1991, the plaintiff served a deposition subpoena on Hasan Muhammad, Deputy Public Counsel for Corrections, directing him to produce various documents.

2. On March 7, 1991, the Deputy Public Counsel of Corrections filed a motion to quash the subpoena on the grounds that disclosure of the information sought would violate Nebraska Revised Statute § 81-8,253 (Reissue 1976) and that the subpoena duces tecum was over broad and unduly burdensome. (Filing 41).

3. On March 20, 1991, the magistrate judge deferred ruling on the motion to quash to allow counsel to make a showing regarding attempts to resolve the matter without the involvement of the court in accordance with Local Rule 20I, "in the absence of which the motion will stand denied." The order observed, without further discussion, "it is true, as argued by the plaintiff in response to the motion, that the state law rules of privilege do not apply in this action."

4. On March 29, 1991, the plaintiff's counsel received a copy of a letter signed by Hasan Muhammad directed to Alfonza Whitaker, Assistant Attorney General, acknowledging receipt of the order of the magistrate judge, saying that if the plaintiff's attorney, Joseph A. Jordano, "has any concerns or business respecting this office, he should set up an appointment to meet me at our office," and saying "I shall rely upon the provision of the Nebraska Public Counsel Law in this matter."

5. Upon receipt of that letter Thomas M. White, a partner in the law firm of which Jordano was a member in Omaha, Nebraska, telephoned Muhammad about

the magistrate judge's ruling, but Muhammad refused to talk with White, insisting that a Rule 20I conference would occur only if Jordano would personally travel to Muhammad's office in Lincoln, Nebraska.

6. On April 1, 1991, Jordano telephoned Muhammad to try to resolve the objection, but Muhammad stated that he would not comply with the court order of March 21, 1991, or the federal subpoena.

7. On April 5, 1991, the plaintiff's counsel filed a motion for an order directing compliance with the subpoena or in the alternative for contempt and sanctions. (Filing 46).

8. On April 5, 1991, the magistrate judge entered an order which said simply: "IT IS ORDERED, the pending motion, filing 41, 'stands denied.' " (Filing 48).

9. On May 9, 1991, the magistrate judge, in filing 49, again without further discussion of the issues of privilege under Neb. Rev. Stat. § 81-8,253 or the claim that the subpoena was over broad or unduly burdensome, said that the state statute does not apply, pursuant to Rule 501 of the Federal Rules of Evidence, and that the court was not obligated to abide by state law rules of privilege in this case. The order then said that the motion for an order directing compliance with subpoena, filing 46, was granted and Hasan Muhammad was ordered to comply with the subpoena duces tecum within ten days, except that the deposition was to be held in Lancaster County, Nebraska, and stated, "[i]n the absence of compliance, an order to show

cause may be sought by plaintiff's counsel."

10. The magistrate judge's order of May 9, 1991, was not served on Hasan Muhammad nor was a copy sent to him by the clerk of the court.

11. On May 15, 1991, Jordano, the plaintiff's counsel, wrote Muhammad, telling Muhammad that the magistrate judge's order had granted Muhammad's office ten days to comply with the subpoena, asked whether ten days was sufficient time and inquired about where and when to take the deposition of Muhammad. That letter was received by Muhammad.

12. On May 28, 1991, Jordano telephoned the office of Muhammad and left a message for him, but that phone call has not been responded to, nor has the letter of May 15, 1991.

13. On June 4, 1991, Jordano filed a motion for contempt and sanctions. (Filing 55). That motion was served on Muhammad by mail. No response to it was made by Muhammad.

14. On July 1, 1991, the magistrate judge by filing 71 granted the plaintiff's motion, filing 55, to the extent that it sought an order to show cause, ordering Muhammad to appear before me on July 25, 1991, to show cause, if any there be, why he should not be held in contempt of the order of May 9, 1991. Filing 71 was received by Muhammad on July 5, 1991.

15. On July 17, 1991, Muhammad for the first time received a copy of the magistrate judge's order of May 9, 1991. On that same day he conferred with and obtained as his counsel Laurie Smith Camp of the attorney general's office.

16. On July 23, 1991, Laurie Smith Camp on behalf of Hasan Muhammad filed a motion for relief from the order of May 9, 1991, and for the entry of a protective order. (Filing 72).

17. On July 25, 1991, an evidentiary hearing was held and written closing arguments were received by the court later.

The argument of Hasan Muhammad is summarized in the written closing argument on his behalf as follows:

> "So, although Muhammad may have been aware that a motion to quash the notice of deposition and subpoena had been denied by the court, and that the court was not persuaded by his argument of privilege, Muhammad was still not in contempt of court for failing to comply with the subpoena and notice of deposition. Because he did not have actual knowledge that the court unequivocally had ordered him to comply with the subpoena and to submit to a deposition in Lancaster County, Nebraska, he should not be held in contempt of that order."

That argument is unavailing. Muhammad had been told in writing by Jordano's letter of May 15, 1991, that the magistrate judge had ordered compliance with the subpoena and Muhammad has offered no reason to doubt the truth of that statement. On July 17, 1991, Muhammad received a copy of that May 9 order, but in the ensuing

days he did nothing to comply. On July 23 he caused to be filed a motion under Rule 60(b) designed to relieve him of the obligation to comply, but in fact he knew for two months before that of the order directing him to comply with the subpoena. Upon his receipt of the May 15 letter there remained under Local Rule 49A approximately four days in which to comply or appeal to this district judge. He did neither; he has not complied to this day.

It was not necessary that Muhammad have in hand a copy of the order before knowledge of its contents was his. As stated in *United States v. Trudell*, 563 F.2d 889 (8th Cir. 1977), where a spectator in a hallway outside a courtroom where a trial was in progress was directed to read the court's standing order about how to conduct oneself in the hallway, the order being "conspicuously posted" and the spectator refused to read it:

> "The evidence shows that the Deputy Marshals through repeated warning, sufficiently apprised appellant that he was obstructing the Court's processes. When directed to walk to the end of the hallway so that the jury could return to the courtroom, he refused. Thus, appellant 'had notice' that his conduct was improper and in violation of the Court's Standing Order."

Muhammad is an attorney; if there was any doubt in his mind about the issuance of an order or its contents, he could easily have checked the court's records. He did not do so.

Hasan Muhammad is in contempt of the magistrate judge's order of May 9, 1991. Sanctions are appropriate but the issue remains as to what sanctions.

The motion now before me, filing 55, asks for monetary sanctions only. The motion appears to be in the criminal, rather than the civil, contempt category. It does not appear to fit within the sanctions of Rule 37 of the Federal Rules of Civil Procedure, because Muhammad is not a party to the action.

The evidence at the evidentiary hearing was to the effect that plaintiff's counsel has expended $3,076 in time and expenses in trying to procure the information requested from the ombudsman's files. That appears excessive to me, because not all the expense generated by the subpoena process should be laid at the feet of Muhammad, but rather that expense related to his refusal to comply with the order of May 9. Hence, only those expenses incurred since the order of May 9 in connection with trying to procure the information from the ombudsman's file are properly the sanction to be put on Muhammad. I estimate that to be ten hours for attorney Jordano and one hour for attorney White, making a total of $750, plus mileage from Omaha to Lincoln and return of $24. Seven hundred seventy-four dollars, therefore, is the amount of sanctions to be imposed upon Hasan Muhammad.[1]

Lest there be concern that I have given it no consideration, I note that this is not a contempt which constitutes a crime as anticipated by 18 U.S.C. § 402 nor is it one for which Muhammad is entitled to a jury trial. *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

---

[1] If either side chooses to submit more detailed evidence on this subject, it may do so by affidavit; otherwise the amount shall stand at $774.

The motion of Hasan Muhammad for relief from the order of May 9, 1991, and for entry of protective order, filing 72, merits consideration in view of the history of this case. It is filed under Rule 60(b) of the Federal Rules of Civil Procedure. That rule permits the court to relieve "a party" from an order for any one of several reasons not applicable here or for "any other reason justifying relief from the operation of the judgment." It seems to me that when one who is not a named party in a lawsuit, but who is the recipient of a direct order from the court, he must be considered a "party" for the purposes of reviewing that order under Rule 60.

I believe Muhammad should be now relieved of the May 9, 1991, order of the magistrate judge because the order now requires the ombudsman to disgorge what may be both privileged and massive documents, without the merits of the objections to the subpoena underlying the order having ever been carefully considered by the magistrate judge. It is true that the order springs from Muhammad's failure to pay attention to Local Rule 20I, which says that a court "shall refuse to consider any motion relating to discovery and production of documents . . . unless moving counsel, as part of the motion, shall make a written showing" of sincere attempts to resolve differences about the discovery request. That set in motion a series of acts culminating in the May 9 order directing him to produce all the documents requested in the subpoena, the order of which he now has been held in contempt. But the magistrate judge's statement that the Nebraska statute designed to protect evidence accumulated by the Public Counsel is not applicable in this case is, I believe, an incorrect statement of the law and, given

the breadth of the subpoena duces tecum, the result of undercutting the purpose of the statute only because Muhammad failed to consult with counsel about discovery is one that should be avoided, if reasonably possible.

Muhammad's motion to quash the subpoena, filing 41, raised two issues: whether the disclosure of the information would violate Neb. Rev. Stat. § 81-8,253 (Reissue 1976) and whether the subpoena duces tecum was over broad and unduly burdensome. Neither of those contentions has been thoroughly analyzed.

Neb. Rev. Stat. § 81-8,253 states:

> "No proceeding, opinion, or expression of the Public Counsel shall be reviewable in any court. Neither the Public Counsel nor any member of his staff shall be required to testify or produce evidence in any judicial or administrative proceeding concerning matters within his official cognizance, except in a proceeding brought to enforce sections 81-8,240 to 81-8,254."

Sections 81-8,240 to 81-8,254 are those sections having to do with the appointment, qualifications, term, salary, personnel, powers, and duties of the Public Counsel. Except for 81-8,253, those sections are not germane here.

In *Bloom v. Sedlacek*, CV81-L-45, I dealt with the issue of the significance of the Nebraska statute and noted its similarity to the Iowa statute, Iowa Code § 601G.20, which had been held to signal the importance of confidentiality on the part of Iowa's counterpart to the Nebraska ombudsman, the Iowa Citizens' Aide. A balancing of the needs of confidentiality against the need of the private litigants for the information in the prosecution of a suit was seen in two unreported decisions of the United

States District Court for the District of Iowa. Similarly, I balanced in that case the interests and found that in the *Bloom* case, "it appears that it would not be possible for the plaintiff to obtain some of the information in another manner. This unavailability of information tips the balance in favor of not affording a privilege." I remain with the view that there does need to be a balancing and that the confidentiality feature, which is the state's interest, must be given respectful weight.

Judge O'Brien in *Shabazz v. Scurr*, 662 F. Supp. 90 (S.D. Iowa 1987) makes a thoughtful description of the process of balancing the competing interests, opining that:

> "[T]he Court is persuaded that the flow of information to the office from citizens would be threatened if it became known that the statutory assurances of general confidentiality would not be respected in federal court. The office cannot compel citizens and other whistle-blowers to come forward; they must choose to do so. Thus, anything which chills a citizen's willingness to come forward limits the office's effectiveness in the long run and may restrict the spectrum of available information. It has been said that a court's primary consideration in privilege cases should be whether the exclusion of the evidence in question would actually promote the creation of information which might not otherwise exist; if so, the exclusion is justified. *Saltzburg, Privileges and Professionals: Lawyers and Psychiatrists.* 66 Va. L. Rev. 597, 600 n. 9 (1980). The Court finds that complaints received by Ray Cornell as

> ombudsman are privileged because such confidentiality is necessary to insure that complaints will be made.
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> . . . This Court spends far too many hours in litigation between prisoners and state officials attempting to remedy problems which could have been prevented or reconciled informally. If state officials become less candid when contacted by an ombudsman out of fear that any admission might be used against him in a subsequent legal action, the power of the office to solve problems will diminish. While informal dispute resolution is seldom protected by privileges, other rules of evidence such as the exclusion of settlement discussions and plea bargain statements reflect 'the public policy favoring the compromise and settlement of disputes.' (Fed. R. Evid. 408 Advisory Committee Note.) This public policy is an appropriate basis for this Court to respect the confidentiality of communications received by the [ombudsman] from state officials."

Recognition of privileges like the one here being asserted is not unknown in the federal arena. In *Roviaro v. United States*, 353 U.S. 53 (1957), the court recognized an informer's privilege, which it described as "the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." The purpose, according to the court, is the furtherance of protection of the public interest in effective law enforcement, and "by preserving their anonymity, [the privilege]

encourages them to perform that obligation." *Id.* at 59. The rule, however, is not absolute. As the court said:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

Id. at 62. That the court was not limiting the informer's privilege to criminal cases is apparent from an earlier statement in the same opinion:

> "A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give away."

Id. at 60-61 (citing *Scher v. United States*, 305 U.S. 251 (1938)); *Wilson v. United States*, 59 F.2d 309 (3d Cir. 1932); *Centoamore v. Nebraska*, 105 Neb. 452, 181 N.W. 182 (1920).

Another privilege mentioned in *Association for Reduction of Violence v. Hall*, 734 F.2d 63 (lst Cir. 1984), is a privilege for "documents that would tend to reveal law enforcement investigative techniques or sources." *Id.* at 65-66, (citing *Black v. Sheraton Corp.*, 564 F.2d 531, 545 (D.C. Cir. 1977)). *See Jabara v. Kelley*, 75 F.R.D. 475, 481

(E.D. Mich. 1977); *Kinoy v. Mitchell*, 67 F.R.D. 1, 11 (S.D. N.Y. 1975); Note, *Discovery of Government Documents and The Official Information Privilege*, 76 Colum. L. Rev. 142, 157-62 (1976).

A third category of privileges recognized in *Association for Reduction of Violence*, is "a privilege for intra-governmental memoranda containing opinions or recommendations of policy-making rather than purely factual import." *Association for Reduction of Violence*, 734 F.2d at 66 (citing *Jabara*, 75 F.R.D. 475 at 481 (E.D. Mich. 1977)); *Kinoy*, 67 F.R.D. at 11 (S.D.N.Y. 1975); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 944-47 (Ct. Cl. 1958).

All this is not to say that some of the documents, at least, in the ombudsman's possession should not be ordered disclosed. It is, rather, to say that there needs to be careful examination of the question of what documents, if any, should be revealed and why. It may be that a particularized need must be shown by the plaintiff, whereas to this point there has only been an assertion made – not supported by evidence – that there is a need for the documents and deposition because the plaintiff cannot otherwise get the information and because the plaintiff is indigent. Until the plaintiff makes an adequate showing that his interests outweigh the interests of the state, the discovery should not be ordered. It may be that the identity of the kind of documents or other information being requested needs to be explored. It is even possible that an in camera study of the documents needs to be made by the judge. Suffice it to say that from what little now is before either the magistrate judge or me, there is not sufficient basis to make an informed decision

about whether any of the information sought should be revealed.

Accordingly, I think I must relieve Muhammad of the May 9, 1991, order. That does not end the matter, however, because not only has the plaintiff made scant showing, but Muhammad has shown an affinity for disregarding this court's Local Rule 20I and this court's orders. When the magistrate judge called the local rule to his attention and directed that counsel make a showing about compliance with it, he refused to talk to opposing counsel on the telephone and said that he would confer with him only if opposing counsel drove from Omaha to Lincoln to Muhammad's office. This kind of stubborn non-cooperation is not countenanced by Local Rule 20I. Now that Muhammad has counsel or if he chooses to proceed without counsel, I expect both sides to take positive and good faith steps to consult one another by accommodative means in trying to resolve the problems arising from the subpoena. The result I am looking for is probably best achieved by my setting this problem back to the point where Muhammad filed the motion to quash. That motion should be examined on its merits, after counsel have fully complied with Local Rule 20I and the court has before it full showings by counsel as to what is involved in the subpoena issue, including the needs on both sides, and the nature, massiveness and relevance of information being sought, so that the court may make a sensible decision on the subject of disclosure.

Muhammad testified at the evidentiary hearing that he intended to stand on the Nebraska statute, section 81-8,253, and would do no other until the Supreme Court

of Nebraska or this court holds the statute unconstitutional. Such a stand does not and will not save him from either complying with or suffering contempt for failure to comply with valid court orders. This court, not Hasan Muhammad, is charged under law with deciding when a statute applies in a disputed case in this court.

IT IS ORDERED that:

1. Hasan Muhammad is held to be in contempt of the magistrate judge's order of May 9, 1991, and is ordered to pay to the plaintiff's counsel the sum of $774, no later that September 30, 1991, although evidence of a different amount may be offered by the plaintiff by affidavit no later than September 13, 1991, and may be responded to no later than September 20, 1991; the motion for contempt and sanctions, filing 55, is granted to the extent stated in this paragraph; and

2. effective on the date of this order Hasan Muhammad is relieved of the obligations of the magistrate judge's order of May 9, 1991; filing 72, the motion for relief from order of May 9, 1991, and for protective order, is granted only to the extent indicated in this memorandum, and the issue of whether the subpoena is to be quashed is returned to the magistrate judge for resolution in accordance with this memorandum and order.

Dated September 4, 1991.

BY THE COURT

/s/ Warren K Urbom
United States Senior District Judge